



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2011

Ms. Bertha Bailey Whatley
Chief Legal Counsel and Public Information Designee
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2011-00261

Dear Ms. Whatley:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 405040.

The Fort Worth Independent School District (the "district") received a request for all district board member e-mails, text messages, and telephone calls from April 20, 2010 through the date the district received the request. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note, and you acknowledge, that you have only submitted information responsive to the portion of the request seeking e-mails. Thus, to the extent any information responsive to the remaining portions of the request, which seek text messages and telephone calls, existed and was maintained by the district on the date the district received the request, we assume you have released it. If you have not released any such information, you must do

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information is not responsive to the instant request because it was created outside of the date range specified in the request. This decision does not address the public availability of the non-responsive information, which we have marked, and it need not be released in response to the present request.

~~Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."~~ Gov't Code § 552.101. Section 552.101 of the Government Code encompasses information made confidential by other statutes, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). We have determined that for the purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also have determined that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You assert the responsive e-mails in Attachment A are confidential under section 21.355. You state that these e-mails evaluate the performance of certified employees because the e-mails find "they have likely engaged in misconduct." Upon review, however, we find you have not demonstrated, nor do the e-mails reflect, how the information at issue constitutes evaluations of a teacher or administrator as contemplated by section 21.355. Accordingly, the district may not withhold the responsive e-mails in Attachment A under section 552.101 of the Government in conjunction with section 21.355 of the Education Code.

Next, you assert Attachment C is excepted from disclosure under section 552.102(a) of the Government Code, which excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Upon review, we find none of the information at issue is excepted from disclosure under section 552.102(a) of the Government Code. Accordingly, none of Attachment C may be withheld on that basis.

We also understand you to assert Attachment C is excepted from disclosure under common-law privacy, which is also encompassed by section 552.101 of the Government

Code. The common-law right of privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note, however, this office has found that the public generally has a legitimate interest in information that relates to the official conduct of public officials and employees. *See Open Records Decision Nos. 562 at 10 (1990)* (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); *see also Open Records Decision No. 423 at 2 (1984)* (scope of public employee privacy is narrow). Upon review, we find you have failed to establish that any of the information at issue is highly intimate or embarrassing and of no legitimate public interest. Therefore, the district may not withhold any of Attachment C under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, you claim the responsive information in Attachment B is excepted under section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See TEX. R. EVID. 503(b)(1)(A)-(E)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the responsive e-mails in Attachment B consist of communications between attorneys for the district and the district's board that were made for the purpose of facilitating the rendition of professional legal services to the district. You state that this information was made in confidence and its confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive e-mails in Attachment B. Accordingly, the district may withhold the responsive e-mails in Attachment B under section 552.107(1) of the Government Code.

We note some of the remaining responsive information may be subject to section 552.117(a)(1) of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, if the employee to whom the information pertains timely requested confidentiality under section 552.024, then the district must withhold the information we have marked under section 552.117(a)(1). If the employee did not timely elect to withhold her personal information, then the district may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Next, we note the remaining responsive information contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure "an e-mail

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Likewise, section 552.137 is not applicable to e-mail addresses that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked are not specifically excluded by section 552.137(c). As such, the marked e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.³ *See id.* § 552.137(b).

~~In summary, the district may withhold the responsive e-mails in Attachment B under section 552.107(1) of the Government Code. If the employee at issue timely requested confidentiality under section 552.024 of the Government Code, then the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. The remaining responsive information must be released.~~

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tf

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 405040

Enc. Submitted documents

c: Requestor
(w/o enclosures)